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RE-ASSESSING THE MARRIED WOMEN'S PROPERTY ACTS

Carole Shammas

In the middle decades of the nineteenth century, literally every state in the United States passed laws known as the married women's property acts or adopted a community property system. Around the same time, the British Parliament and the Canadian Provinces approved similar acts.¹ Altogether these revisions represented the most substantial change in women's legal status in 700 years of the common law, and contemporary feminists considered the legal changes to be a great victory for the movement. In certain respects, this legislation was analogous to the emancipation proclamations and related acts concerning enslaved persons. Neither resulted in equality. Wives did not suddenly become the equals of their husbands any more than freed African Americans became the equals of their former masters. But the legal changes, to a great extent, released both from the patriarchal authority of master and husband and set up new relationships between themselves and the state. Unlike emancipation, however, neither the married women's property acts nor the establishment of community property law has found a place in the pantheon of important historical events. Nor have the past two decades of research in women's history done much to boost their reputation. In this paper, I would like to focus upon these acts in the United States, how they have been evaluated by historians and why we might want to reconsider this evaluation both in respect to women's history and the history of American society in general.

A Brief Description of the Married Women's Property Acts and the Community Property System

Under the common law, as it was transferred to the colonies in the seventeenth and eighteenth centuries, a woman's personalty (all property except land and improvements) went to her husband when she married, and her realty came under his control. She became a *feme covert*. Ordinarily she had no need to write a will, because her personal property already belonged to her husband, and even after her death he continued to possess her real estate for life, a practice known as curtesy, provided a child had been born of the marriage. Afterwards it automatically devolved upon her descendants. She could not name guardians for her children and might even be excluded from guardianship by her husband's will. Nor could she

sue in court without her husband. In exchange, the common law obligated a husband to maintain his wife in necessities suitable to his rank in life and guaranteed her, if she survived him, a lifetime dower right of one third of the profits from realty he owned during the marriage. Aside from this one obligation, he could do anything he pleased with his estate, which included all of the personalty his wife had brought to the marriage as well as the profits from her realty. In many English jurisdictions, dower had at one time included a one-third share of personalty forever. During the seventeenth century, however, Parliamentary statutes reduced dower to just the realty share for life and all colonies except Maryland followed suit. Once a widow, the woman regained her legal persona of *feme sole*, but her property situation depended upon what her husband left her in his will, or, if she renounced that, her dower.²

The only way a married woman could keep property out of the clutches of her husband was to resort to an equitable settlement. Equity jurisprudence, dispensed through the Chancery court, drew on innovative principles and procedures foreign to the common law but in some respects familiar to the Roman law of continental Europe.³ In the area of spousal property rights, Chancery recognized the concept of married women's separate property. From the late sixteenth century on, wealthy English women and their families found that under certain circumstances Chancery would uphold the right of a woman, most often a wife separated from her husband or a widow about to be remarried, to have a separate estate that was controlled by a trustee rather than her spouse. Although the exact reasons for the emergence of equitable separate estates remain obscure, they, along with the strict family settlement, seem to have developed in response to Tudor-Stuart legislation (principally the Statute of Uses, the Statute on Wills, and intestacy statutes) and common law court decisions that eliminated the traditional methods of protecting brides' dowries and restricted the kinds of property subject to widows' dower. As a result, the bride and her lineage group needed new means to safeguard the property she brought to a marriage.⁴

Slowly, colonies in America adopted some procedures from equity, including provisions for married women's separate estates.⁵ A husband had to agree to make a settlement, either prior or during marriage, that transferred property to trustees who held it for her benefit. Trustees could have a great deal of power or none depending on how the settlement was drawn up. Also, fathers or first husbands could by will or deed shelter property from possible depredation by their sons-in-law or their widows' second husbands by creating a separate estate in equity. On the other hand, there were not to be any secret trusts about which husbands had no knowledge.

Beginning in the 1830s, during that decade's banking crisis, a few state legislatures in the U.S. introduced laws protecting certain types of property a wife brought to a marriage from her husband's creditors. Soon women's rights advocates organized around the issue, and the legislation became more comprehensive. Between the 1840s and 1880s, most states passed a series of acts that went beyond debt protection and recognized the right of married women to manage, enjoy the profits, sell, and will personal and real property that they had owned prior to marriage or had been given or inherited from a third party during marriage. Later versions often added earnings from wage work or businesses to what could be considered women's separate property. Some states also included in the legislation safeguards against husbands unilaterally preventing their wives from being guardians of their children.⁶

Seven of the jurisdictions that entered the union or organized as territories in the mid-nineteenth century rejected altogether the common law arrangement for family property and adopted the community property system favored in many western European countries and Mexico. This system allowed for separate property but also gave the wife a claim to one half of the property she and her husband acquired during their marriage. While married, the husband managed this conjugal fund, but he could not will away his wife's half. This system dispensed with dower and curtesy, a big attraction to many legislators who disliked the way these lifetime interests interfered with the alienation of property. Women had the right to will their separate property and in some states one half of the community property as well. Neither spouse had a claim on the other's separate property, if their mate chose to will it to someone else.⁷

It is important to note that in neither common law nor community property states did wives possess the legal right to control the assets that accumulated during marriage due to their performance of household services for other family members. That authority was the husband's. Equal control and ownership of the conjugal fund and its appreciation have continued to be important issues for feminists today.

The Current Assessment of the Married Women's Property Acts

The most efficient way to judge the historiographical fate of past events is to consult current American history textbooks. In surveying seven popular texts published in the last few years, I discovered that only one has a separate index item for married women's property acts.⁸ Most texts discuss the legal disabilities of married women without using the term *feme covert* or indicating that a whole system of law had developed around that status. And none reveal that literally every state radically altered coverture

in the third quarter of the nineteenth century. Rather, there are brief sentences that indicate some states began giving wives more powers over property. Why states passed the married women's property acts is left vague. Some texts imply activity by women's rights groups brought about the change, while others indicate it was primarily done to help bankrupt men. That a number of new states abandoned the part of the common law that related to family property and entered the union as community property states is never even mentioned.

In ignoring these developments, the textbook writers are, at least partially, reflecting the ambivalence of many historians who have worked on women's legal and political status in the nineteenth and twentieth centuries. Mary Beard, in the 1940s, first attacked the importance of the married women's property acts, arguing that the remedies had already been available to early American women through the equity courts and that all the new statutes produced was a large amount of confusing judicial opinion. Ignorance of the law, she contended, explains why earlier feminists, such as those who compiled *A History of Women's Suffrage*, considered the legislation crucial.⁹

At the time Beard wrote, however, very little research had been done on how equity courts actually operated in early America. In the last decade there have been half a dozen studies that greatly enhance our knowledge of that branch of jurisprudence.

Marylynn Salmon's *Women and the Law of Property in Early America* covers the situation up to 1820.¹⁰ Her study reveals the hostility towards equity in those colonies founded by dissenter groups. Puritans had opposed these courts in England, characterizing them as tyrannical tools of the Royal Prerogative. Connecticut never established equity courts. It took Massachusetts until 1818 to pass a statute that clearly permitted common law courts to handle equity matters, including those having to do with women's separate estates. Even then, court rulings greatly limited the use of equity in that state. "It was not until the middle of the century," according to Richard Chused, "that a viable system of equitable rules became available to married women" in Massachusetts, and by that time married women's property acts were being passed.¹¹ Pennsylvania, Salmon tells us, had a similar history.¹²

In colonies such as New York, Maryland, Virginia, and South Carolina, equity courts did operate, and separate estates had a firmer place in the law. But how many people actually used the device and did its use increase over time? Salmon who has studied the registration records for South Carolina estimates that relatively little use was made of equity until after 1750, and that in the 1780-1810 period no more than 1 to 2 percent of couples marrying used the device. Usage did not seem to accelerate in the early

nineteenth century. Suzanne Lebsock, studying marriages with prenuptial agreements in the town of Petersburg, Virginia, reports these agreements appearing with similar frequency in the late eighteenth and early nineteenth century, although between the 1820s and 1860, she finds the proportion increased to about 4 percent. Unlike the situation earlier in South Carolina, separate estates created postnuptially by deed or will exceeded the prenuptial agreements in number, but what proportion of Petersburg marriages they affected is not clear. Often postnuptial agreements were emergency measures resorted to by bankrupt husbands trying to salvage some family resources from creditors. Richard Chused, looking at a small number of Baltimore County wills, found 8 to 15 percent in the 1810-1840 period granting a woman a separate estate. In 1846 the percentage jumped to 25 percent, but that was four years after Maryland had passed its first married women's property act. In New York, couples did not have to register their marriage settlements. While impressionistic evidence indicates an increase in marriage settlements, it is unclear as to whether they are prenuptial or postnuptial. Litigation surrounding these separate estates also seems to have grown in volume and became one of the major justifications for the need to pass a married women's property act in the state.¹³

A wife's separate estate did not necessarily include all the property she brought to a marriage. Nor did all wives holding separate estates have the ability to control the property, sell it, or will it. In South Carolina, the proportion of women with marriage settlements who had the sole control of their property actually declined over the hundred year period 1730 to 1830, going from one half to 30 percent. More settlements specified the joint control by wife and husband. Likewise the proportion of women being able to bequeath their separate property dropped significantly, going from about one half to less than a quarter. Instead more and more agreements provided for the property to descend automatically to the woman's children. In Petersburg, merely 18 percent of the women with postnuptial separate estates could make a will and only a quarter could sell that property. Those making settlements prior to marriage and after 1840 had much more power. Sixty-two percent could sell the property and 80 percent had testamentary power over it.¹⁴

A big drawback to the equitable settlement as a means of giving women control over property was the fact that prospective grooms and husbands more or less had to agree to women taking this action. If a bride had made a prenuptial agreement or deeded property without the knowledge of the man she married, the courts judged the transaction fraudulent.¹⁵ In the marriage market, all other things equal, women seeking a prenuptial agreement were in a disadvantageous situation. Once married,

the only incentive for a husband to agree to settle property on his wife was fear of financial ruin. In Petersburg, Suzanne Lebsock described that situation as the most common one for the drafting of a marriage settlement.¹⁶ These postnuptial transfers were the ones that provoked the most litigation, because a husband had to prove that at the time he created the separate estate for his wife that his assets exceeded his liabilities by at least the amount he settled on her. What would be interesting to know is the degree to which the increase in separate estates was due to an increase of this particular form as opposed to the prenuptial form.

A seldom noted difference between equity practice in the states and the married women's property acts is that the latter often did not recognize transfers of property from husbands to wives.¹⁷ The acts made it more difficult, not easier, for males in financial trouble to pass property off as their wives' separate estate.

Recent analyses of the property rights of early American women, then, do not support Beard's depiction of equity as making the acts unnecessary. They suggest that equity had a difficult time getting recognized in much of the northern portion of the United States. It tended to be utilized by a small proportion of the population and the specific powers granted to women in managing their own property were often very limited. Even establishing a pattern of growth in women's control over property due to more equitable settlements being drawn up is problematic, because it is uncertain how much of the increase can be attributed to husbands using equity arrangements to cope with the bankruptcy epidemics of the antebellum period. But, if scholars today have reservations about equity's benefits, they also are far from unanimous about the importance of the changes wrought by the married women's property acts.

Norma Basch, the author of the most detailed case study of a state's married property reform, the 1848-1862 acts in New York, relates in her introduction how she expected the acts to be revolutionary but found out they weren't. Her job, she remarks, became to explain why things did not change.¹⁸

Nancy Cott, in discussing the earnings portion of the legislation, also stresses its limited aspects. Yet she notes as well that commentators at the time emphasized how much the law had changed regarding female economic capacities rather than how much it had stayed the same.¹⁹ In Suzanne Lebsock's view, these early feminists overstated the changes in female status.²⁰

Why do these scholars argue that the acts did not result in that much change for women? Some of their reservations about the impact of the married women's property acts stem from studying the role the judiciary played in paring down the scope of the legislation. Work has been done on

the judicial opinions handed down in three states—New York, Oregon, and Arkansas—after passage of the laws. Norma Basch surveyed cases in the appellate and Supreme courts of New York between 1848 and 1880. Among the most important judgments restricting the impact of the acts were rulings that (1) the 1848 act could only apply to women married after 1848 or to property of married women (regardless of marriage date) acquired after 1848; (2) in order to contract, married women had to specify that their separate estate would be charged with the debt; (3) to claim earnings as part of a separate estate under the Earnings Act of 1860, the earnings had to be paid by a third party, the services had to be unconnected to household activities (e.g., boarding, sale of eggs and butter), and the woman had to specify that she was operating under a separate account. Further research on the earnings statutes indicate a similar situation in many other states.²¹ In Oregon, Richard Chused has shown that judges made women's separate property liable for the payment of family consumption costs, when husband's property was insufficient. New work on support laws in New York show the courts there coming to the same conclusion in the early twentieth century.²² According to a study of Arkansas's married women's property acts, which legislators constantly augmented from the 1830s on, the courts would agree to no powers over separate property on the part of married women except those particularly specified in statute. Most problems arose over a woman conveying property or making contracts without the acknowledgement of her husband.²³ In Canada, judges acted much like their counterparts in the U.S. to blunt the impact of provincial legislation, until at the end of the nineteenth century laws were passed that put an end to this "judicial footdragging."²⁴

So what seemed, from the language of the acts in many states, to promise near equality, in practice left husbands with the upper hand when it came to control over family resources. Clearly the "judicial patriarchy," as Michael Grossberg has labeled it,²⁵ wished to maintain male control of and responsibility for what in Roman law would have been considered community property. In the context of what some nineteenth-century feminists had hoped for and late twentieth-century feminists have won, the married women's property acts seem disappointing.

When viewed from the perspective of the early American period, however, the acts appear to be a more important turning point in female status. Coverture, scholars are now showing, was not one of those English precedents taken on in a fit of absent-mindedness by colonials, and then dismantled after the Revolution. For almost two generations, as Linda Kerber and Joan Hoff demonstrate, male politicians resisted any distur-

bance of the system. In her recent survey of women's legal status in the United States, Hoff writes,

to the degree that the legal status of married women before and immediately following the American Revolution is looked upon primarily in terms of property rights obtained through equity procedures or statutory and common law, the historical and legal record remains a bleak one until the 1830s.²⁶

Within this context, the married women's property acts and earnings acts passed in the decades after the 1830s represent a dramatic shift in policy. Husbands could not unilaterally dispose of assets wives brought to a marriage or will them away from them. Under most circumstances, wives had the right to use of their separate property and to the transfer of it to others. In cases of marital breakdown, they could protect their earnings from the claims of their husband. In community property states, wives were entitled to one half of marital property upon the death of their husbands. While Hoff argues that in equal rights terms, this legislation was too little too late, she acknowledges that it overthrew the old authority structure and brought about the "demise of coverture."²⁷

But how do we know the demise of coverture actually mattered in a material sense? It has been argued in the case of English equity procedures and statutory changes regarding women's separate property that a husband's physical power and psychological influence over his wife was so great that she could be "kicked or kissed" out of the ownership of property regardless of the law.²⁸ In other words, evidence that shows significant legal changes does not necessarily mean women held more property.

Did the Acts Make Any Difference in Women's Ownership and Control of Property?

The best test of whether coverture's demise—as heralded by the married women's property acts and community property legislation—actually resulted in increased female ownership of property is to look at studies of wealthholding over time. Most of these studies rely on probate records. If the end of *feme covert* status led fathers and husbands to increase the portions they gave to daughters and widows and enabled wives to keep their own property during marriage rather than turning it over to their husbands, then this change should show up in estate inventories and estate tax returns of single, married, and widowed women. Because the acts did not apply retroactively, however, the biggest impact in probate records would not come until the women who had come of age around the time

the legislation was passed began to die in large numbers. In other words, it would come thirty to forty years later, towards the end of the nineteenth century.

Table 1

Percentage of Colonial Probated Decedents who were Women
and
the Percentage of Total Personal Wealth they Owned

Time and Place	N	% Women	Women's % of Wealth
1660-73 Essex Co. Mass.	300	9.0	4.3
1660-76 Virginia	134	3.0	1.4
1724-29 Virginia	299	9.4	6.1
1685-1755 Bucks Co. Pa.	748	9.5	5.3
17th c.-1771 New Hampshire	3341	4.5	2.3
1774 American colonies	919	8.8	3.7

Source: Essex Co. Massachusetts, *The Probate Records of Essex County, Massachusetts* 3 vols., (Salem, 1916); Virginia 1660-76 and 1724-29, from the court records of York, Westmoreland, Northumberland, Henrico, and Isle of Wight counties, Virginia State Library, Richmond; Bucks County, Pennsylvania, in *Will Papers*, Bucks County Courthouse, Doylestown, Pa.; New Hampshire, Daniel Scott Smith, "The Demography of Widowhood in Preindustrial New Hampshire, David I. Kertzer and Peter Laslett, eds., *Aging in the Past: Demography, Society, and Old Age* (Berkeley and Los Angeles: University of California Press, forthcoming 1994); and American colonies from Alice Hanson Jones, *Wealth of a Nation to Be: The American Colonies on the Eve of the Revolution*, (New York: Columbia University Press, 1980), 220-224, 428. The percent of wealth in this 1774 figure is of living wealthholders and only physical wealth.

Table 1 shows the proportion of probated estates, both testate and intestate, that belonged to women during the colonial period and the percentage of total probated wealth that women's estates constituted. In the case of estates, the proportion belonging to women is under 10 percent in all areas—New England, Middle Colonies, and the South, as well as in the colonies as a whole. In the case of wealth, they owned 6 percent or less. These figures do not include landed wealth because normally probate inventories excluded realty. As women were less likely to possess landed wealth than personalty, this exclusion has the effect of overestimating the proportion of wealth owned by women. The percentage of wealth owned by women in 1774 (3.7%) was taken from Alice Hanson Jones's sample, and it represents an estimation of wealthholding among the living population, not just probated decedents. As can be seen, the transformation does not elevate the percentage. It is true that sex ratios in colonial America tended to be high (i.e. more men than women), particularly in the seventeenth century, reducing the number of women at risk to leave estates. By the

Revolutionary era, however, females made up an estimated 47 to 48 percent of the population, so it cannot really explain much of the enormous variation in property ownership by sex.

Table 2

Percentage of U.S. Probated Decedents or Estate Tax
Wealthholders who were Women
and
the Percentage of Total Wealth they Owned 1790-1979

Time and Place	N	% Women	Women's % of Wealth
PROBATE INVENTORIES*			
1790-1801 Bucks Co. Pa.	701	16.5	7.0
1803-29 Butler Co. Ohio**	249	7.2	3.1
1825 Westchester Co. NY	43	25.0	0.0
1829-31 Massachusetts	3698	16.1	6.9
1830-59 Butler Co. Ohio**	718	15.9	4.2
1850 Essex Co. NJ**	30	0.0	n.a.
1859-61 Massachusetts	6922	26.2	13.9
1860-65 Butler Co. Ohio**	184	18.0	9.5
1875 Essex Co. NJ**	60	21.6	n.a.
1879-81 Massachusetts	11142	36.9	16.5
1889-91 Massachusetts	14608	42.8	26.7
1891-93 Bucks Co. Pa.	761	37.8	34.6
1890-1910 Sacramento Co. Ca.	307	34.5	n.a.
1898-1900 L.A. Co. Ca.**	293	33.4	16.6
1900 Essex Co. NJ**	60	40.0	n.a.
1929-44 Dane Co. Wisc.	415	36.0	28.2
1957 Cook Co. Ill.	74	37.8	n.a.
1963 Washtenaw Co. Mich.	346	44.5	n.a.
1964 Cuyahoga Co. Ohio	659	39.0	n.a.
1968-84 Sacramento Co. Ca.	342	51.2	n.a.
1969 King Co. Wash.	74	50.0	50.1
1979 Bucks Co. Pa.	570	47.4	52.8
ESTATE TAX RETURNS***			
1922 United States	395508	24.7	24.5
1948 United States	901369	31.2	31.1
1949 United States	962353	31.7	31.9
1950 United States	1041613	31.6	31.1
1953 United States	1371187	32.9	39.4

* Probate wealth in Massachusetts and in all areas in the twentieth century includes realty as well as personalty.

** Testate estates only

*** The estate tax figures for 1922 are based on the economic (net) estate. The others are based on gross estate figures.

Source: Bucks Co. Pa., see Table 1; Butler Co. Ohio - William H. Newell, "The Wealth of Testators and Its Distribution in Butler Co. Ohio 1803-65," in James Smith ed. *Modelling the Distribution and Intergenerational Transmission of Wealth*, (Chicago: University of Chicago Press, 1980), 110; Westchester Co., NY - Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth Century New York*, (Ithaca: Cornell University Press, 1982), 102-106; Massachusetts - *Twenty-fifth Annual Report of the Bureau of Statistics of Labor*, (Boston: State Printers, 1895), Part II, The Distribution of Wealth, 264-267; Essex Co., New Jersey - Lawrence M. Friedman, "Patterns of Testation in the Nineteenth Century: A Study of Essex County (New Jersey) Wills," *American Journal of Legal History* 8 (Jan., 1964): 36; Sacramento Co. California - Debra S. Judge and Sarah Blaffer Hrdy, "Bias and Equality in American Legacies: Some Underlying Factors, unpublished paper, Anthropology Dept., University of California, Davis, 1988; Los Angeles Co. California - Los Angeles County Hall of Records, Los Angeles; Dane Co. Wisconsin - Edward H. Ward and J. H. Beuscher, "The Inheritance Process in Wisconsin," *Wisconsin Law Review* 1950: 401; Cook County, Illinois - Allison Dunham, "The Method, Process, and Frequency of Wealth Transmission at Death," *University of Chicago Law Review* 30 no. 2 (1962-63), 249; Washtenaw Co. Michigan - Olin L. Browder Jr. "Recent Patterns of Testate Succession in the U.S. and England," *Michigan Law Review* 67 (May 1969): 1306; Cuyahoga Co. Ohio - Marvin B. Sussman, Judith N. Cates, and David T. Smith, *The Family and Inheritance*, (New York: Russell Sage, 1970), 71; King Co. Washington - John R. Price, "The Transmission of Wealth at Death in a Community Property Jurisdiction," *Washington Law Review* 50 (Feb. 1975): 297-298 and 308; U.S. estate tax returns Robert J. Lampman, *The Share of Top Wealth-Holders in National Wealth 1922-56*, (Princeton: Princeton University Press, 1962), 255-257.

Table 2 displays the situation in the United States after 1790 and up to the present. During the first half of the nineteenth century, evidence is available from Bucks County, Pennsylvania; Butler County, Ohio; Westchester County, New York; Essex County, New Jersey; and the entire state of Massachusetts. The proportion of women going through probate and writing wills increased modestly in Bucks County over the course of the eighteenth century (see Table 1), going from 9.5 percent to 16.5 percent. A similar kind of increase occurred in Butler County during the first half of the nineteenth century. Female testates started at 7.2 percent in the first three decades and then went up to almost 16 percent. The increase may be due to more frequent resort to equity, but it also may reflect lower sex ratios and declining nuptiality (more women never marrying and thus eligible to write wills). Sixteen percent is very near to the percentages one finds in several different communities in early modern England where the frontier effect is not a factor, and in the 1829-31 sample from the state of Massachusetts. The samples from Westchester County, New York and Essex County, New Jersey are so small that it is difficult to know what to conclude, one showing 25 percent participation and the other showing 0 percent. The Westchester proportion was totally due to unmarried women's wills. As usual, no married woman left a will.²⁹

Even in those places where the percentage of probates who were women increased, the percentage of wealth stayed stubbornly at colonial levels, 3 to 7 percent. Wealth estimates drawn from the census confirm how little had changed. Lee Soltow's study of the wealth reported in the decennial censuses, correctly titled *Men and Wealth in the United States 1850-1870*, estimates that in 1860 women and children together constituted only 5.6 percent of wealthholders and that they owned only 7.2 percent of all wealth.³⁰

As the major legislation on married women's property begins to be passed at mid-century, those states with new laws show increases in the proportion of women going through probate and their share of wealth. Earlier than almost any other place in the country, Ohio allowed married women to write wills. Its major legislation concerning married women's separate estates, however, passed later, in 1861.³¹ Butler County women in the 1830-59 period made up nearly 16 percent of testators, but their share of total testate wealth amounted to no more than 4.2 percent, not much more than the 3.1 percent contributed by female testators in Butler County in the 1803-29 period when their share of willmakers was less than half of what it was in 1830-59. In the following time period, 1860-65, during which the legislation passed, the share of wealth doubled, reaching 9.5 percent. Still 82 percent of the testators were male and 90 percent of testate personal wealth belonged to men. Because legislatures and courts did not make married women's property acts retroactive, it took a generation for the full effects to be felt. Massachusetts had passed its principal legislation in the 1840s and in 1855. Back in 1829-31, 16 percent of probated estates belonged to women and they accounted for about 7 percent of total probated wealth. These percentages were not terribly different from the 9 percent of probated decedents who were women in late seventeenth-century Essex County, Massachusetts (see Table 1) and their 4.3 percent of total probated wealth. In the post-legislation period, 1859-61, over one quarter of probated estates belonged to women, and they had doubled their share of wealth. In 1880, the proportion of probate participation and of total wealth continued to rise. And by the 1890s, the results are striking: 42.8 percent of probates were women and they owned over one quarter of total wealth.

The timing of the change is easiest to chart in Massachusetts because of successive surveys of probate records done by the Bureau of Labor Statistics for a study of wealth inequality, but the *fin-de-siècle* levels attained by other jurisdictions suggest a similar pattern of increase. In Bucks County, the percentage of probated decedents who were women increased from 16.5 percent in the 1790s to 37.8 percent in the 1890s, and their percentage of wealth rose much more steeply, going from 7 percent to 34.6

percent. Confining the sample to just testators, a similar proportion (38.5%) were female. After 1880, no jurisdiction whether in the East or the West had less than a third of its probated decedents or testators women. The proportion of wealth owned by women varied more, because of the greater variability of the wealth distribution, but generally reached levels far above what it had been any place prior to the passage of the acts or adoption of community property law.

By the early 1900s, women's participation in probate and their proportion of total wealth reached a plateau. Neither probate inventories and estate tax returns (which include a much smaller and richer segment of decedents than do the inventories) show much of a secular trend during the first fifty years of the twentieth century. Probate participation does not exceed 40 percent and between the 1920s and 1950 the proportion of estate tax returns belonging to women increased only from 24.7 percent to 31.6 percent, with an almost identical increase in the proportion of wealth owned. After 1950, aided by changes in the estate tax law, more frequent use of joint tenancy in the purchase of residences, and a growing gap between male and female life expectancy, as well as more generous male bequest patterns, female participation and share rose to the 50 percent level.

Considering that circa 1900 about one out of every three estates belonged to a woman and women held on the average around a quarter of probated wealth, it seems fair to say that more change in female wealthholding occurred between the 1860s and the 1890s than had transpired in the previous two hundred years of American history.

The increased probate activity of married women can be clearly demonstrated. Table 3 shows over time the changing proportion of female testators who were married. In the early American period, married women's wills, written with the permission of a husband or by virtue of a separate estate, constituted no more than a few percent of all female testaments. They jump to at least double digits by the later nineteenth century, and in the community property state of California they actually made up 40 percent of all female testators. Even when, as was the case in Bucks County in the 1890s, wives did not compose that big a percentage of the testators, they were influential in terms of proportion of wealth possessed. In Bucks they owned 63.8 percent of their sex's share of wealth. In the later twentieth century, the increasing gap between male and female life expectancy has swelled the proportion of widows and reduced the proportion of married women in the probate population. Also, divorce has thinned the ranks of the married. Still, in California in 1980, 26 percent of female testators were wives.

Table 3

Marital Status of Female Testators, Colonial Times to the Present

Time and Place	N	Single	Married	Widow/ Divorced
17th c.-1771 New Hampshire	92	8.0%	3.0%	89.0%
1685-1755 Bucks Co. Pa.	46	4.3	2.2	93.5
1690-1790 Charleston Dist. SC	72	0.0	0.0	100.0
1774 American colonies*	79	7.6	1.3	91.1
1790-1801 Bucks Co. Pa.	58	8.6	5.2	86.2
1825 Westchester Co. NY	12	25.0	0.0	75.0
1850 Westchester Co. NY	13	46.2	7.7	46.2
1891-93 Bucks Co. Pa.	135	34.8	17.7	47.4
1898-1900 Los Angeles Co. Ca.	87	12.6	40.2	47.2
1953&1957 Cook Co. Ill.	68	38.2	14.7	47.1
1969 Kings Co. Wash.*	31	19.4	16.1	64.5
1979 Bucks Co. Pa.*	164	13.4	10.4	76.2
1980 Los Angeles Ca.	295	19.3	26.1	54.6

* Includes intestates

Source: For New Hampshire, Bucks Co., Los Angeles Co., Cook Co., and Kings County see Tables 1 and 2. For Charleston District, South Carolina - John E. Crowley, "Family Relations and Inheritance in Early South Carolina," *Histoire sociale/Social History* 17 (May 1984): 42; American colonies - Alice Hanson Jones, ed., *American Colonial Wealth: Documents and Methods* 3 vols., (New York, Arno Press, 1977), passim; and Westchester Co. New York, Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth Century New York*, (Ithaca, New York: Cornell University Press, 1982), 102-106.

Influence of another type is more conjectural. One assumes that parents and husbands, knowing their daughters and remarried widows could hold separate estates, enlarged their shares and began reducing the number of lifetime only bequests. This assumption is bolstered by what we know about nineteenth-century inheritance patterns. Most probate studies indicate favoring of sons over daughters fell sharply or disappeared over the course of the nineteenth century, and that widow's portions, which seem to have reached a nadir circa 1800, rose.³²

One other factor that brought up the proportion of female testators and the percentage of wealth they owned is not a direct result of the married women's property acts, although it and the acts may have some common causes. That factor is the increase in the share of spinsters among the adult female population during the nineteenth century. Table 3 indicates single women began increasing their numbers as testators prior to the passage of the acts and were of great importance in raising the proportion of estates belonging to women in such places as Bucks County, Pennsylvania. They were less important in boosting the proportion of wealth, however. Single women held much smaller estates on average than

married women and widows. In Bucks County in the 1890s, single women's wealth out of all female testate wealth only amounted to 16.5 percent. In the same time period in Los Angeles it came to a mere 1.9 percent. At the end of the nineteenth century wives were the ones driving up the percentage of wealth owned by women.

It is also worthwhile pointing out those factors that continued to depress female property ownership in probate records. Married women were at a disadvantage because in common law states assets accumulated through the household services of women were counted as the husband's separate property. Widows could only claim a third of that property with their realty share sometimes being for life only. Women who divorced had no guaranteed share at all. Not until the legal reforms of the late 1960s and 1970s did this change significantly and debates continue on the equity of current divorce arrangements in many states. Also of importance has been the disproportionate use of life estates for daughters and particularly widows. After the passage of the married women's property acts, the wills of husbands less often put time limits on the bequests of their wives, but the practice continued and it is still around in the form of spousal bypass trusts.

In summary, I think the evidence is fairly strong for concluding that women held a negligible amount of property in early America right up to the Civil War and that equity arrangements had yet to make a discernible difference nationwide. For the generation that came of age in the latter decades of the nineteenth century, directly after the passage of the married women's property acts or the adoption of a community property system, the situation changed markedly. Propertied and wage-earning women did not take their places along with men in running American business, but they were at least in a position to make some decisions about their and their family's own consumption, investments, and wealth transmission. Wealthy women and wives whose husbands failed to support them and their children benefitted the most. Whether the decisions these women made differed from those men made remains to be studied.³³ In terms of magnitude, the only other statutory changes relating to women and property that rival the married women's property acts and the adoption of community property law in importance would be the so-called displaced homemaker legislation of the 1970s that enlarged the intestacy and election rights of widows and enhanced the claims of a wife to her husband's separate property at the time of divorce.

Did the Acts Make Any Other Difference in American History?

Obviously, from the viewpoint of women's status, the married women's property acts made a difference. But the influence of the legislation goes beyond more power for propertied women. Most students of the acts allude to a relationship between nineteenth-century economic developments and the passage of the legislation, but the interpretations are contradictory and occasionally misconstrue the effects of the acts. Sometimes the statement is made that legislators passed the acts to cushion the blows of a market economy and aid bankrupt men.³⁴ It is true that some of the earliest married women's property acts, mostly passed during the 1830s and early 1840s in southern states, sought to protect a married woman's property from the creditors of her husband. The more comprehensive legislation thereafter, however, usually made it more difficult than under equity for husbands in economic trouble to transfer wealth to their wives. In all the acts, pre-1848 and post, the common concern was for the fate of the woman's patrimony, not for male bankrupts. It was not fair, proponents argued, for husbands to be able to do as they pleased with the property, presumably from her father or her previous husband, women brought to a marriage. Where these protestors were in the seventeenth and eighteenth century is an interesting question, to which I will return. But the point to be made here is that these acts generally served to split up family capital rather than shore it up.

Other analysts of the acts group them with those changes that facilitated the expansion of the market. "The doctrine of coverture," Deborah Rhode explains in a recent book, "developed in a feudal agricultural society" and "was ill-suited for an expanding commercial economy."³⁵ The notion, however, that the married women's property acts eased land and credit transactions also has problems. Rather, one could make the reverse argument that what had facilitated land and credit transactions for centuries had been coverture, the near complete loss of rights over property that a woman experienced upon marrying. The complicating factors in alienation of property under the old system were dower and curtesy. The married women's property acts did not do away with them, and most common law states retained these "feudal relics" throughout the nineteenth century and into the twentieth. Moreover, those states that abolished dower, as well as some that did not, passed homestead exemptions, another dependency device, allowing widows of modest means to remain in their dwelling houses for life, regardless of creditor claims.³⁶

What made the married women's property acts and states' adoption of community property rules so significant in terms of the economic structure is not that they acted as either a shield from or a tool of capitalism.

Rather, it is that they were one of the crucial elements in changing its structure from family-based management to corporate-based management. The mid-nineteenth century, as noted in a recent article, was the time in which the legal personhood of not only enslaved people, but corporations and white women were being debated in antebellum state legislatures.³⁷ These issues, though usually championed by different interests, shared more than a common rhetoric. All sought to weaken the patriarchal element in capitalism by providing alternative sources of authority over capital and labor. Contemporaries, of course, drew parallels between the legal plight of white women and enslaved African Americans of both sexes, but the relationship between incorporation and women's property rights is less understood. The growth of personality, much of it due to the issuance of corporate stocks and bonds, made the amending of *feme covert* status all the more pressing and contributed to the passage of the married women's property acts in the various states.³⁸ But incorporation also made the acts feasible. That is, it is difficult to imagine the passage of such married women's property legislation prior to the corporatization of the financial sector, something that had been largely accomplished by mid-century.³⁹ Perhaps the reason that no one voiced strenuous protests about the confiscation of a wife's patrimony by her husband or his creditors in the seventeenth and eighteenth century has something to do with the fact that, at that time, marriage, with a dowry, coverture, and no divorce, constituted the principal method of capital formation for men in society.

The causal arrow, however, did not just point from the corporatization of the financial sector to the married women's property acts. Rather a reciprocal relationship existed, whereby the acts also promoted incorporation. Once married women could retain their own personality, stocks and bonds became a very attractive form of wealth for men to give to females because the management of it could be undertaken by others at a lesser cost than was the case with realty or a business. The legislation also made the family a less reliable organizational unit for capital formation. A formal dowry transferred to a husband became something of an anachronism, and wives had a legal claim to all property they brought into the marriage. Presumably, in most marriages, affluent wives financially aided husbands in their business endeavors, but the law no longer compelled such transfers. Rather it often cast doubts upon their legality when creditors or heirs brought suits. The legislation reduced the economic benefits to men of marrying propertied women and by inference their commitment to such unions. From a husband's perspective, divorcing a woman who had brought property to a marriage had previously made sense only in the case of adultery. After the married women's property acts, there was less to lose. Wives seeking divorce now had a much surer claim to the property they

brought to a marriage. The late nineteenth century witnessed a more rapid increase in the divorce rate, though the actual levels were low, than at any other time in U.S. history.⁴⁰ Whatever the cause, and of course much more was involved than simply the married women's property acts, the increased incidence of marital dissolution also pointed up the growing fragility of the family as a unit for capital accumulation and management.

Usually, the demise of the arranged match, the late nineteenth-century jump in divorce rates, and the increase in spinsterhood among affluent females are interpreted as signs that the affective side of marriage had triumphed over the material interest side and that men and women expected more emotional and sexual satisfaction from their unions. There may be some truth to these assertions, but in one respect they seem faulty. Women, given their disadvantageous position in the labor market, still overwhelmingly relied upon marriage for material well-being. The generalizations better fit men who increasingly obtained less in the way of economic advancement from marriage. For them, female physical attributes and personality traits may have taken on added importance in the choice of a mate. Thus the middle-class spinster of the turn of the century may not only have been pulled from marriage by new opportunities in education and the professions but also pushed out of the marriage market by men who attached little value to her education and who no longer had the right to take her property.

From a political standpoint, the acts were a testimony to the extent to which the U.S. political system promoted individual property rights. The process of freeing the individual from the patrilineage, begun for men with the Statute of Wills in the 1540s, took three hundred years more to have much of an impact on wives. In the end, though, most states preferred to give women these rights rather than to bind the two lineages more tightly and further encumber men's separate property with community property requirements or to have the states take on new responsibilities such as family allowances, expanded welfare programs, and improved enforcement of support laws. As a result, the benefits a woman accrued from the change were directly proportional to the amount of separate property she could claim. As many women had no such property, the advantage they obtained was the right to use their own earnings in supporting themselves and their families when their husbands would or could not. Currently, feminists are split over where the equal rights strategy has taken women, given the very different reproductive roles of the sexes. Historically, however, it has always been easier in the United States to argue for an extension of rights to new groups than to argue for a redistributive function for the state. Nowhere is that tendency more apparent than in the case of the married women's property acts.

NOTES

¹ For the United States, see Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991), 127-135; for Great Britain, see Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth Century England* (Toronto: University of Toronto Press, 1983), and Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England 1850-1895* (Princeton: Princeton University Press, 1989); and for Canada, see Constance B. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada," *Law and History Review* 6, no. 2 (1988), 211-257.

² See Anon., *The Laws Respecting Women* (London, 1777); Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986); and Carole Shammas, Marylynn Salmon, and Michel Dahlin, *Inheritance in America: From Colonial Times to the Present* (New Brunswick: Rutgers University Press, 1987), Chapter 1.

³ The Roman law tradition allowed a married women to administer lineage properties not part of her dowry. In some areas of France, brides also had the option of retaining the right to administer their dowry property, if they wrote it into their marriage contracts. See Barbara Diefendorf, "Women and Property in Old Regime France: Theory and Practice in Dauphine and Paris," unpublished paper, 1990.

⁴ Maria L. Cioni, *Women and Law in Elizabethan England with Particular Reference to the Court of Chancery* (New York: Garland, 1985) discusses the emergence of equity jurisprudence in England. Shammas et al., *Inheritance in America*, 23-30, deals with the effects of the legislation. Susan Staves' *Married Women's Separate Property in England, 1660-1833* (Cambridge: Harvard University Press, 1990), Chapters Two and Three, review the shrinkage of dower rights in England through judicial decisions and legislation.

⁵ Salmon, *Women and the Law of Property in Early America*, Chapter Five.

⁶ Hoff, *Law, Gender, and Injustice*, 127-135, and Appendix One, and Richard H. Chused, "Married Women's Property Law: 1800-1850," *Georgetown Law Journal* 71 (June, 1983): 1359-1424.

⁷ Shammas et al., *Inheritance in America*, 83-88, 252-258.

⁸ The textbook with the reference to married women's property acts in the index is Mary Beth Norton et al., *A People and a Nation* (Boston: Houghton Mifflin, 1988). The other texts surveyed were Paul S. Boyer et al. *The Enduring Vision: A History of the American People* (Lexington, Mass.: Heath, 1990); Winthrop D. Jordan et al. *The United States: Conquering a Continent* (Englewood Cliffs, N.J.: Prentice Hall, 1987); Thomas A. Bailey and David M. Kennedy, *The American Pageant* (Lexington, Mass.: Heath, 1987); James West Davidson et al., *Nation of Nations* (New York: McGraw Hill, 1990); Robert Kelley, *The Shaping of the American Past* (Englewood Cliffs, N.J.: Prentice Hall, 1990); James A. Henretta et al., *America's History* (Chicago: Dorsey Press, 1987).

⁹ Mary Ritter Beard, *Women as a Force in History* (New York: Macmillan, 1946), v, 113-121, 155-169.

¹⁰ Salmon, *Women and the Law of Property*.

¹¹ Richard H. Chused, "Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850," *Berkeley Women's Law Journal* 2 (Fall, 1986): 51.

¹² Marylynn Salmon, "Republican Sentiment, Economic Change, and the Property Rights of Women in American Law," in *Women in the Age of the American Revolution*, eds. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1989), 458.

¹³ Salmon, *Women and the Law of Property*, 88; *Ibid.*, "Women and Property in South Carolina: The Evidence from Marriage Settlements, 1730 to 1830," *William and Mary Quarterly* 39, no. 4 (1982): 655-685; Suzanne Lebsock, *The Free Women of Petersburg: Status and Culture in a Southern Town 1784-1860* (New York: Norton, 1985), 54-86; Chused, "Married Women's Property Law: 1800-1850": 1379; and Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth Century New York* (Ithaca: Cornell University Press, 1982), 73.

¹⁴ Salmon, "Women and Property in South Carolina," 678-680; and Lebsock, *Free Women of Petersburg*, 67, 72-76.

¹⁵ English Chancery courts established the principle that prenuptial agreements kept secret from husbands were fraudulent, Staves, *Married Women's Separate Property*, 50-53. On rulings in the States see, *Black v. Jones*, 8 Ky. (1 Marshall) 312 (1819); *Chapline v. Moore*, 23 Ky. (7 Monroe) 150 (1828); *Hobbs v. Blanford* *Ibid.* 469. Husbands also went to court to try to set aside pre-nuptial settlements that had not been secret. See *Hildreth v. Eliot*, 25 Mass. (8 Pickering), 293 (1829).

¹⁶ Lebsock, *Free Women of Petersburg*, 61-66.

¹⁷ See 1848 New York law reprinted in Basch, *In Eyes of Law*, 233, which reads "it shall be lawful for any married female to receive, by gift, grant, devise, or bequest, from any person other than her husband and hold to her sole and separate use, as if she were a single female, real and personal property. . . ." The law operated in a similar fashion in Massachusetts, where gifts of husband to wife with the exception of insurance and personal items under \$2000 could be revoked or creditors could seize. See George A. O. Ernst, *The Law of Married Women in Massachusetts*, (Boston: Little Brown, 1897), 122. Laws in Arkansas and Mississippi also refused to protect property that came from a husband. See Michael Dougan, "The Arkansas Married Women's Property Law," *Arkansas Historical Quarterly* 46 (1987): 14-16.

¹⁸ Basch, *In Eyes of Law*, 9. Peggy A. Rabkin, *Fathers to Daughters: The Legal Foundation of Female Emancipation* (Westport, Conn.: Greenwood Press, 1980) also discusses the New York married women's property acts. She argues that the impetus for changing the law came from fathers eager to protect their property from sons-in-law but is not concerned specifically with the impact of the laws.

¹⁹ Nancy Cott, *The Grounding of Feminism*, (New Haven: Yale University Press, 1987), 186-187.

²⁰ Suzanne D. Lebsock, "Radical Reconstruction and the Property Rights of Southern Women," *Journal of Southern History* 43 (1977): 197.

²¹ Basch, "Eyes of the Law," Chapter Seven, and Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," *Journal of American History* 75 (1988): 471-500.

²² Richard H. Chused, "Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures," *American Journal of Legal History* 29 (1985): 3-35; and Martha May, "Spousal Support Law and the Duties of Gender in the Nineteenth Century," unpublished paper, 1989. Kathleen Elizabeth Lazarou, *Concealed Under Petticoats: Married Women's Property and the Law of Texas 1840-1913*, unpublished Ph.D. dissertation, 1980, argues that the laws in Texas were passed primarily to give families a maintenance in times of economic instability and to keep them off the relief rolls.

²³ Dougan, "The Arkansas Married Women's Property Law": 3-26.

²⁴ Backhouse, "Married Women's Property Law in Canada": 242.

²⁵ Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985).

²⁶ Linda K. Kerber, "The Paradox of Women's Citizenship in the Early Republic: The Case of *Martin vs. Massachusetts*, 1805," *The American Historical Review* 97 (1992): 349-378; and Hoff, *Law, Gender, Injustice*, 87.

²⁷ *Ibid.*, 121. Backhouse, "Married Women's Property Law in Canada," 212, also sees a great contrast between the property rights of Canadian wives at the beginning and at the end of the nineteenth century.

²⁸ Staves, *Married Women's Separate Property in England* 34, 228-230.

²⁹ Basch, *In the Eyes of the Law*, 102-106.

³⁰ Lee Soltow, *Men and Wealth in the United States 1850-1870* (New Haven: Yale University Press, 1975), 200.

³¹ Chused, "Married Women's Property Law," 1367, 1409.

³² Carole Shammas, Marylynn Salmon, and Michel Dahlin, *Inheritance in America: Colonial Times to the Present* (New Brunswick: Rutgers University Press, 1987), 108-119; William H. Newell, "Inheritance on the Maturing Frontier: Butler County, Ohio, 1803-1865," in *Longterm Factors in American Economic Growth*, eds. Stanley L. Engerman and Robert E. Gallman (Chicago: University of Chicago Press, 1986), 267-269, and Toby Ditz, *Property and Kinship: Inheritance in Early Connecticut, 1750-1820*, (Princeton: Princeton University Press, 1986), *passim*.

³³ Daniel Scott Smith, "A Higher Quality of Life for Whom?: Fertility Patterns of Consumption within the Households of Late Nineteenth-Century American Workers," paper delivered at the 1991 American Historical Association Meeting in Chicago, uses expenditures on men's and women's clothing as a proxy to measure women's budgetary power. Among working-class families in the late nineteenth century, expenditures for male clothing relative to female clothing were much higher than is the case with more recent data where female expenditures exceed those made for men's apparel. What the situation was in the earlier nineteenth century, however, is not known.

³⁴ These statements usually appear in textbooks. See, for example, Henretta et al., *America's History*, 397. Those who have studied the acts and the relationship with debtors and bankruptcy qualify the connection. See Elizabeth Bowles Warbasse, *The Changing Legal Rights of Married Women* (New York: Garland Press, 1987), Chapter Four, and Chused, "Married Women's Property Law," 1400-1404.

³⁵ Deborah Rhode, *Justice and Gender: Sex Discrimination and the Law* (Cambridge: Harvard University Press, 1989), 24-25.

³⁶ Shammass et al., *Inheritance in America*, 85-86.

³⁷ Rowland Berthoff, "Conventional Mentality: Free Blacks, Women, and Business Corporations as Unequal Persons," *Journal of American History* 76 (1989): 753-789.

³⁸ Marylynn Salmon, "Republican Sentiment, Economic Change, and the Property Rights of Women," 447-475.

³⁹ Shammass et al., *Inheritance in America*, 5. Also see J. Van Fenstermaker, *The Development of American Commercial Banking: 1782-1837*, in Kent State University Bureau of Economic and Business Research publication no. 5 (1965).

⁴⁰ Michael Gordon, *The American Family* (New York: Random House, 1978), 294.